23

Supreme Court, U
FILED
AUG 12 1953
HAROLD B. WILLEY, Cler

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 254

IN RE: CITATION OF SHERMAN K. LEVINE FOR CONTEMPT OF COURT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

ORVILLE BROWN
New Castle, Pa.
FRANK O. MORETTI
New Castle, Pa.
JOHN S. POWERS
New Castle, Pa.
SHERMAN K. LEVINE
New Castle, Pa.
Attorneys for Petitioner.

SMITH BROS. CO. INC., LAW PRINTERS, 434-438 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Statement of the Case	5
Specifications of Errors to Be Urged	9
Reasons for Granting the Writ	10
Argument	11
I. The Majority Opinion Constituted a Violation of Due Process of Law, in Holding We Must Take the Lower Court's Finding of Fact as Conclusive	11
II. Due Process Demands a Trial Before an Impartial Judge Uninfluenced by Acrimonious Feelings	20
Conclusion	21

TABLE OF CASES

Poluski v. Glen Alden Coal Co., 286 Pa. 473	13
Com. v. Truitt, 369 Pa. 72	13
Harrah v. Montour RR., 321 Pa. 526	13
Com. v. Truitt, 169 Pa. Sup. 327	13
Anderson v. Dunn, 6 Wheat 204, 5 L. Ed. 242	14
In Re Oliver, 333 U.S. 257, 92 L. Ed. 683	14
Sacher v. U. S., 343 U. S. 1	17
Ex rel. Oregon P. & N. Co. v. Fairchild, 224 U.S. 510, 56 L. Ed. 863	18
B. & O. RR. v. U. S., 298 U.S. 349, 80 L. Ed. 1209	18
Fisher v. Pace, 336 U.S. 155	18
Tumsy v. Ohio, 273 U.S. 510, 71 L. Ed. 749	20
Cook v. U. S., 267 U.S. 517	20

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

IN RE: CITATION OF SHERMAN K. LEVINE FOR CONTEMPT OF COURT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Sherman K. Levine, petitioner, prays that a Writ of Certiorari issue to review the decisions of the Supreme Court of Pennsylvania, Western District, handed down on February 14, 1953, and rehearing denied on March 24, 1953. On June 20, 1953 Mr. Justice Burton extended the time for filing this petition to and including August 15, 1953.

Opinions Below

1. The opinion of the lower Court, the Court of Quarter Sessions of Lawrence County, Pennsylvania, rendered on January 23, 1952, finding the petitioner guilty of contempt, is reported in the record page 171a to 197a.

Jurisdiction

2. The opinion of the Superior Court of Pennsylvania, affirming the conviction and sentence of contempt on technical grounds only (although the majority of Court were for reversal they could not agree on the grounds of reversal), is reported in 170 Penn. Super. 579, and was rendered on April 22, 1952.

3. The opinion of the Supreme Court of Pennsylvania affirming the judgment, conviction, and sentence of the Court below (by a divided court) was rendered on February 14, 1953, and is reported in 372 Pa. 612.

4. The order of Supreme Court of Pennsylvania denying the petition for reargument on March 24, 1953, is unreported, but is set out at 372 Pa. 612, 613.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. 1257(3). The decision sought to be reviewed is the refusal of the Supreme Court of Pennsylvania to grant a petition for reargument, filed February 24, 1953, and denied, per curiam, March 24, 1953, in which petition, Petitioner specifically set up and claimed under said Fourteenth Amendment of the Constitution of the United States his right not to be deprived by the Commonwealth of Pennsylvania and the majority opinion of the Supreme Court of Pennsylvania of his liberty and property without due process of law. On June 20, 1953 Mr. Justice Burton extended the time for filing this petition to and including August 15, 1953.

QUESTIONS PRESENTED.

1. Is it a violation of due process to take the findings of fact of the lower court as conclusive; which facts appear nowhere in the testimony, and are contrary to the testimony?

2. Is it a violation of due process for the appellate court of Pennsylvania to sustain a lower court judge in holding a member of the bar in contempt for alleged language that was never uttered and which no one says was uttered but which the lower court in its adjudication finds was uttered and the Supreme Court of Pennsylvania holds that the adjudication is conclusive?

3. Where a judge makes an unprovoked malicious attack upon a district attorney, and treats a truthful, courteous reply as contempt, is it a violation of due process?

4. Where a judge elects to take testimony and in the taking of that testimony is not only judge but prosecutor and is dominated by acrimonious feelings, is not such a hearing a mockery and travesty on justice and a violation of due process?

5. Where a judge makes an unprovoked malicious personal attack, accusing a district attorney of "defrauding the taxpayers of their money", is it a violation of due process for the court to treat the reply of district attorney, "that the taxpayers were getting their money's worth from his office", as contempt?

6. Is it a violation of due process for the Pennsylvania Supreme Court to refuse to review the facts set forth in the record, and take findings of fact by trial

judge as conclusive, which findings of fact are untrue and contrary to the testimony?

7. Where a judge elects to try an alleged contemptor by hearing, after filing specifications, and the lower court calls witnesses to testify as to the language used by the district attorney, and the appellant calls witnesses to testify as to what happened, and the judge examines the appellants witnesses at length, and the testimony educed shows that appellant was not guilty of contempt, is it a violation of due process for the Supreme Court to refuse to review these facts, and take the lower court's findings of fact as conclusive, to sustain the contempt, which findings are both contrary to and not supported by evidence?

STATUTE INVOLVED.

U. S. C. A., Constitution of the United States, Amendment XIV

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis supplied)

STATEMENT OF THE CASE.

Sherman K. Levine, petitioner and District Attorney for Lawrence County, Pennsylvania, was cited for contempt on December 10, 1951, by W. Walter Braham, President Judge of Lawrence County, for alleged acts occurring on November 30, 1951. He was found guilty by W. Walter Braham on January 23, 1952, and a sentence was immediately imposed. Sometime during the week of November 19, 1951, Judge Braham informed the District Attorney he would be out of town the following week, including November 30, 1951. (R. 120a-121a).

Mr. Levine (R. 121a) then went to the Hon. John G. Lamoree, the additional law Judge and arranged with him (test. of Judge Lamoree R. 70a) to hold sentence court on Friday, November 30, 1951. The day in question was the Friday preceding the convening of the December Grand Jury. It had been the custom in Lawrence County to devote the Fridays before Grand Jury for sentence court (R. 62a), Judge Braham sitting on one day and Judge Lamoree on another day (R. 75a). On or about November 23, 1951, the District Attorney's office mailed notices to all defendants to appear in court (R. 86a) for sentence. Contrary to his announced plans Judge Braham was also present on Friday, November 30, 1951. On Friday, November 30, 1951, Judge Braham convened Court Room Number 1, and immediately took up the business of an election recount. Three Department of Public Assistance cases were set down on November 19, 1951, for hearing on November 30, 1951, to be disposed of by either branch of the Court (R. 91a, 92a). At 9:00 A. M. Friday, November 30, 1951, Judge Lamoree convened Court Room Number 2. Both the District At-

torney and the Assistant District Attorney were in Court Room Number 2 before Judge Lamoree taking care of many defendants who were there for sentence. (R. 71a) Court Room Number 2 did not adjourn until after 12:00 noon, (R. 71a), and a sentence was disposed of in the afternoon. At about 9:30 Judge Braham sent a messenger to Court Room Number 2, demanding the presence of either the District Attorney or the Assistant District Attorney. Mr. Levine told the messenger that they were busy and were unable to come immediately, but would come as soon as they could get away. At about 10:15 A. M., Mr. Levine entered Court Room Number 1, and was immediately accosted (R. 36a) by Judge Braham and accused of defrauding the taxpayers (R. 40a). Mr. Levine had entered Court Room Number 1 to dispose of the Dudash case. Mr. Levine replied the taxpayers were getting their money's worth (R. 40a). No mention was made at that time by Judge Braham that he considered Mr. Levine's conduct contemptuous. On December 3, 1951, Judge Braham called the District Attorney into his office and dictated a letter in his presence of his intention to cite Mr. Levine for contempt (R. 103a to 105a). Mr. Levine then asked Judge Braham, what language he used that was contemptuous and Judge Braham admits he did not inform the District Attorney the language attributed to him (R. 121a). On December 10, 1951, Judge Braham filed specifications charging Mr. Levine with contempt, and still did not set forth the contemptuous language ("that's the way with this court, always mixing things up; everything is set on one day"), which the District Attorney was to be ultimately found guilty.

Counsel for Mr. Levine filed a Motion suggesting that Judge Braham, inasmuch as personal feeling entered into the matter, should disqualify himself, and that the case should be heard by the other branch of the Court of Quarter Sessions, the Honorable John G. Lamoree.

Judge Braham refused to disqualify himself and testimony was taken. The petitioner, Sherman K. Levine, through his counsel, made requests for Findings of Fact. Those requests for Findings of Fact were completely ignored and in this record are undisposed of by the Court that heard the case. On January 23, 1952, Mr. Levine was called back into Court and Judge Braham imposed the sentence, and entered an adjudication finding the appellant, Sherman K. Levine, guilty of contempt on three grounds; (1) his failure to abandon court room #2 and come into court #1 on demand; (2) writing a letter to the Judge; (3) using insulting language when he did appear in court room #1. Sentence was pronounced at that time on January 23, 1952. The alleged contempt occurred on November 30, 1951. A rule was issued by the lower court Judge on December 10, 1951, to show cause why the appellant, Sherman K. Levine, should not be guilty of contempt. A hearing was had on December 17, 1951. The Judge called six witnesses to testify what occurred in open court. The appellant called eleven witnesses. The Superior Court of Pennsylvania on April 22, 1952, by a divided court affirmed the judgment of conviction. Although the majority of the court favored reversal, they could not agree on the reason. On February 14, 1953, the Supreme Court of Pennsylvania by a divided court, 372 Pa. 612, affirmed the judgment of conviction. A petition for reargument

was timely filed, alleging that the opinion of the Supreme Court of Pennsylvania violated the due process clause of the 14th Amendment of the U. S. Constitution. The Reargument was refused on March 24, 1953, and judgment of conviction was affirmed on March 24, 1953: 372 Pa. 612. The Supreme Court of Pennsylvania, 372 Pa. 612, reversed the lower court on two counts of contempt, and held your appellant, Sherman K. Levine, not guilty of contempt, (1) when he failed to abandon court room #2 and come to court room #1, and (2) writing a contemptuous letter. However, the conviction was affirmed on the use of insulting language which for the first time appeared in the adjudication filed by Judge Braham, (lower court Judge) on January 23, 1952. The majority opinion of the Supreme Court of Pennsylvania held that they must take the findings of fact of the lower court as a conclusive presumption (372 Pa. 612) even if the testimony was contra, and even if the lower court's own witnesses testified contra to the Judge's findings of fact. The majority opinion further held at 372 Pa. 612, 618, 619, that acrimonious feeling which would disqualify a judge from sitting on a case, must have existed prior to the case and not during the hearing. It is these rulings in the majority opinion which violate the due process clause.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Supreme Court of Pennsylvania erred:

1. In holding that their opinion did not violate the due process clause and that they must take the lower court's findings of fact as conclusive as to whether the District Attorney used the language attributed to him by the Judge, even though testimony of the judge's own witnesses including the court crier, and the testimony of the petitioner's witnesses do not support the said findings of fact by the lower court.

2. In holding that they were bound by the lower court's findings of fact, (even though such findings of fact are contrary to the evidence, and in fact are not supported by a scintilla of evidence) and that there was no violation of the Fourteenth Amendment of the Constitution of the United States by such ruling.

3. In holding that acrimonious feeling of a trial judge at a hearing does not disqualify a judge and entitle the petitioner to a new trial, and that acrimonious feeling to justify a new trial must have existed prior to the hearing, and that this was not a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

4. That the self serving findings of fact by the trial judge, "That's the way with this Court, always mixing things up; everything is set on one day," constituted contempt, and that such holding was not in violation of due process clause of the Fourteenth Amendment to the United States Constitution.

5. Failing to grant a new trial before an impartial judge.

6. Failing to hold as a matter of law that the petitioner was not guilty of contempt and in failing to reverse the lower court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Supreme Court of Pennsylvania, in holding that there was no deprivation of due process of law, presents an important question of construction of the Fourteenth Amendment of the Constitution of the United States. Does the due process clause of Fourteenth Amendment protect a citizen against arbitrary findings of fact by a State Court, which are contrary to the evidence and which facts appear nowhere in the testimony? We believe that it does, as more fully and at large hereinafter set forth in the "Argument".

2. Further the decision of the Court below in holding that there was no deprivation of due process of law, failed to properly apply the decisions of the Supreme Court of the United States, as hereinafter more fully and at large set forth in the "Argument".

3. The questions presented here, thus are of importance to all citizens of every state, to every attorney, and particularly to petitioner herein. A free and unbridled bar are just as important to the proper administration of justice and preservation of our freedoms as a free judiciary.

ARGUMENT.

I.

The Majority Opinion Constituted a Violation of Due Process of Law, in Holding We Must Take the Lower Court's Finding of Fact as Conclusive.

While the petitioner, Sherman K. Levine, was busily engaged in Court Room #2, Judge Braham presiding in Court Room #1, sent a messenger to Court Room #2, demanding the District Attorney abandon Court Room #2, and come immediately to his court room. The District Attorney replied he would come as soon as he was able. The petitioner did appear in Judge Braham's Court Room during recess of Court Room #2.

We believe the majority opinion of the Pennsylvania Supreme Court erred in taking as a verity Judge Braham's findings of fact, "He then broke into a rude and insolent denunciation of the court saying 'that's the way with this court, always mixing things up; everything is set on one day' ". . The Judge then said "The people of this county are paying for two district attorneys. They are entitled to have one in each courtroom." To this the District Attorney replied: "The people of this county are getting their money's worth from the District Attorney's office."

The above statements do not appear anywhere in the record, except in Judge Braham's self-serving adjudication, which is 13th finding of fact (R. 175a, 176a). The testimony shows that Judge Braham spoke first, and in substance accused the District Attorney of defrauding and cheating the taxpayers, when he failed to aban-

don Judge Lamoree's Court and come immediately to his Court Room. (R. 36a, 40a, 41a, 97a, 98a, 139a, 140a, 146a, 147a, 153a).

It should be noted that Judge Braham chose not to rely on Judicial knowledge as to events occurring in his Court on November 30. He called Clifford L. Vance, his court crier and inquired of him what was said (R. 36a): Q. "Because I didn't set out in the citation the specific language and yet there is specific language introduced on the part of the defendant. Could you tell us what was said when Mr. Levine finally came into court?"

The testimony of the court crier substantiated Mr. Levine and showed a personal attack upon Mr. Levine and the office of District Attorney. Nowhere does the language attributed to Mr. Levine appear in the record. Six witnesses were called by Judge Braham and eleven on behalf of the District Attorney, including Judge Lamoree. Nowhere in their testimony, both upon direct and cross examination, is there a scintilla of evidence supporting Judge Braham's findings. Judge Braham cross examined the District Attorney at length (R. 117a to 133a) and never once questioned him concerning the statements he was to find the District Attorney guilty of making.

This testimony corroborating the District Attorney and showing that he was not guilty of contempt could not be ignored. When the majority opinion ignored this testimony and treated the entire hearing as a nullity, it completely failed to adhere to many former opinions of our appellate courts.

Argument.

In *Poluski v. Glen Alden Coal Co.*, 286 Pa. 473, 476; *Com. v. Truitt*, 369 Pa., 72, 98; *Harrah v. Montour RR*, 321 Pa., 526, 528; and *Com. v. Truitt*, 169 Sup. 327, 333, 334: Our Pennsylvania Courts have time and again held that incompetent or inadmissible evidence, including hearsay, admitted without objection is not a nullity or void of probative force, but is to be given its natural probative effect as if it was in law admissible. This is true even in criminal cases.

Since incompetent testimony, once admitted without objection, must be given its full probative force, certainly competent direct testimony offered without objection can not be ignored but must be given its full probative effect. The testimony of Judge Braham's witness, the court crier, which corroborates the District Attorney and negates the Judge's findings remains unimpeached. Had this case been tried before another Judge, other than Judge Braham, a demurrer would have been sustained to the Judge's testimony at the close of the prosecution.

For an excellent discussion on the majority opinion of Pennsylvania Supreme Court violating the due process clause see Justice Jones' dissenting opinion, 372 Pa. 612, 624, to 643.

The due process clause of the Federal Constitution guarantees to every individual a fair and impartial hearing and a verdict based only upon the evidence offered at the hearing.

It is true that the United States Supreme Court has often said, that for contempt committed in open Court, the trial Judge may immediately punish the offender

summarily without a hearing and such practice is due process, because it is essential to the protection of the courts in their discharge of their functions.

But the highest court has from time to time announced that the power to summarily punish for contempt would not be extended and would be limited wherever possible.

In *Anderson v. Dunn,* 6 Wheat (U.S.) 204, 231, 5 L. Ed. 242, 248, the Court in defining the limits of contempt possessed by any judge or body stated, "The least possible power adequate to the end proposed." The *Anderson Case, supra,* has been quoted often by the Supreme Court.

In Re Oliver, 333 U. S. 257, 274, 275, 92 L. Ed. 683, 694, 695, the Court said:

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex Parte Terry, 128 US 289, 32 L. Ed. 405, 9 S Ct 77, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the mashal's assailant occurred within the 'Personal view' of the judge, 'under his own eye,' and actually interrupted the trial of a cause then under way. This court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a Court's business could not be conducted unless it could suppress

disturbances within the courtroom by immediate punishment. *However this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragements to its expansion beyond the suppression and punishment of the Court-disrupting misconduct which alone justified its exercise.* Indeed, in the Terry Case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat (US) 204, 5 L ed 242, which had marked the limits of contempt authority in general as being *'the least possible power adequate to the end proposed,'* Id. 6 Wheat (US) at 231, 5 L ed 248. And see Re Michael, 326 US 224, 227, 90 L ed 30, 32, 66 S Ct 78.

That the holding in the Terry Case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases was spelled out with emphatic language in Cooke v. United States, 267 US 517, 69 L ed 767, 45 S Ct 390, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense.

Furthermore, the Court explained the Terry rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that if 'not instantly suppressed and punished, demoralization of the court's authority will follow'. Id. 267 US at 536, 69 L ed 773, 45 S. Ct. 390.

Except for a narrowly limited category of contempts, due process of law as explained in the Cooke Case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. ***The narrow exception to these due process requirements included only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about*** these essential elements, due process requires, according to the Cooke Case, that the accused be accorded notice and a fair hearing as above set out." (Emphasis supplied)

333 US 275

Argument.

A careful reading of the *Oliver Case, supra,* establishes the principal that for a judge to punish summarily without hearing, the misconduct must occur in the presence of court, under the eye of the judge, and *must disturb the court's business, and where immediate* punishment is essential to prevent demoralization of the court's authority. If some essential element is absent then due process requires a hearing.

In the instant case, Judge Braham on November 30th, did not find his court so demoralized that instant punishment was necessary. Since he did not deem instant punishment necessary, the lower court could not proceed on January 23, 1952, to punish the District Attorney summarily, and treat both his own witnesses' testimony and the testimony of the District Attorney as a nullity. This is the fundamental reason behind the cases, which hold where a court does not punish summarily at the time of the occurrence and does nothing to preserve jurisdiction, it loses its right to proceed summarily, and must proceed by notice and hearing.

Sacher v. U. S., 343 U. S. 1, is cited by the majority opinion as holding that the court could delay for a long period of time and then proceed summarily to punish the offender without notice and hearing. The Sacher Case, *supra,* is in line with other cases. It does not hold that the courts power to summarily punish for contempt is preserved forever. In the Sacher Case, *supra,* the acts of contempt of the attorneys occurred throughout the trial for eight months,—the acts were part of the record of the trial. As soon as the trial was over the court did punish the attorneys summarily. There, there was a necessity to postpone action by the trial judge. Defendants

were on trial before a jury and the trial judge was duty bound not to do anything that would jeopardize the rights of the defendants or influence the jury. An excellent discussion on the *Sacher case* appears in the dissenting opinion of Justice Jones (372 Pa. 612, 635, 636, 637).

The Supreme Court of the United States time and again has held that findings of fact contrary to the evidence is a violation of the due process clause: *Ex rel. Oregon P&N Co. v. Fairchild,* 224 U.S. 510, 56 L. Ed. 863; *B & O RR, v. U. S.,* 298 U.S. 349, 368, 369, 80 L. Ed. 1209, 1224; 12 Am. Juris. 309. In *Fisher v. Pace,* 336 U.S. 155, (both the majority and dissenting opinion upon an appeal from the Texas Courts in a Contempt case) the court did not take the trial judge's findings that the attorney was guilty of contempt as conclusive, but under the due process clause made an independent examination of the facts as they appeared in the record before arriving at their determination.

If there ever was a case that lacked the fundamentals of fairness throughout, it is this contempt against the District Attorney. The alleged act occurred on November 30, 1951. On December 3, 1951, the District Attorney asked Judge Braham what he was supposed to have said, and the Judge refused to tell him. Judge Braham admits the District Attorney asked him what was said and that he did not tell him (R. 121a). On December 10, 1951, the trial judge filed his specifications for contempt and still did not inform the District Attorney what language he considered rude and insolent. Art. 1, Sec. 9, of Pennsylvania Constitution, assures to every defendant the right "to demand the nature and cause of the accusation

against him." On January 23, 1951, the trial judge (13th finding of fact R. 175a, 176a) in his adjudication found the language ascribed to the District Attorney by the majority opinion. Nowhere does this language appear in the testimony. An examination of the colloquy between Judge Braham and the attorneys at the opening of the hearing on December 27th, 1951, (R. 30a, 31a), the adjudication and findings of fact, shows that throughout it was Judge Braham's desire to punish the District Attorney for his failure to abandon Judge Lamoree's Court. Judge Braham was determined to use the extraordinary power of contempt to determine this right. All of the members of the Supreme Court have agreed that this was not contempt.

A careful reading of the record leaves no doubt that Judge Braham's anger primarily was due to the denial of this right and not to anything that occurred in his court room on November 30th, 1951.

It should be noted that only two Justices of the majority opinion concurred in attributing this language to Mr. Levine, the petitioner. The remaining two Justices of the majority opinion (372 Pa. 612) concurred in the results only. The two Justices dissenting, Justices Jones 372 Pa. 612, 624 to 643, and Justice Musmanno, 643 to 654, clearly state this language does not appear in the notes of testimony and the testimony of the lower court Judge's own witnesses is to the contrary. The first time this alleged language appears in the case is in the adjudication filed on January 23, 1952 for an alleged contempt occurring on November 30, 1951.

II.

Due Process Demands a Trial Before an Impartial Judge Uninfluenced by Acrimonious Feelings.

The majority opinion of the Supreme Court of Pennsylvania announced that acrimonious feeling to disqualify a judge must exist prior to the hearing and it was not a violation of due process if this acrimonious feeling existed during the hearing.

The majority opinion by restricting the rule, requiring a judge to disqualify himself, on account of bias and prejudice to acrimonious feeling existing prior to trial, clearly misapprehends the reason for the rule. Due process demands that a defendant be given a fair and impartial hearing—that the trial judge be impartial. There is greater danger to a defendant when the acrimonious feeling occurs during the hearing than when it existed prior to the hearing. This Court has time and again reversed cases where the records shows that the trial Judge was impartial or biased. The record clearly exuded personal feeling and pique upon the part of Judge Braham, (see illustrations in Justice Jones opinion (372 Pa. 612, 641, 642)).

The Supreme Court of the United States has often held that due process demands a fair and impartial hearing before an impartial tribunal. In *Tumsy v. Ohio,* 273 U.S. 510, 71 L. Ed. 749, the Court stated that a hearing before a justice who had an interest in the outcome of the case lacked one of the essential elements of due process.

In *Cook v. U. S.,* 267 U. S. 517, 519, the court in reversing a contempt case suggested on retrial that an impartial judge be assigned to try the case.

CONCLUSION.

We submit in this case Judge Braham should have disqualified himself and that the matter should have been heard by an impartial judge, and that the bias and unfairness which permeated throughout the lower court's hearing constituted a violation of the due process clause of the Fourteenth Amendment. We feel that a defendant in a contempt case is entitled to not only the form but to the fundamentals of a fair trial. We submit that the Supreme Court of Pennsylvania in taking the lower court's self serving adjudications and findings of fact as conclusive, when the said adjudications were both contrary to the evidence and were not supported by a scintilla of evidence, constituted a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioner respectfully prays therefore that the within petition for certiorari be granted.

Respectfully submitted,

ORVILLE BROWN
New Castle, Pa.
FRANK O. MORETTI
New Castle, Pa.
JOHN S. POWERS
New Castle, Pa.
SHERMAN K. LEVINE
New Castle, Pa.
Attorneys for Petitioner.

FILED
SEP 17 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 254

IN RE: CITATION OF SHERMAN K. LEVINE FOR CONTEMPT OF COURT.

RESPONDENT'S BRIEF

ALVAH M. SHUMAKER,
New Castle, Pa.
WILLIAM D. COBAU and
J. GLENN BERRY,
COBAU & BERRY,
New Castle, Pa.

Attorneys for Respondent.

MILLER, PYLE & STREET, PRINTERS

INDEX

Page

Questions Presented 1

Statement of the Case 2

Argument: 5

I. No federal question properly raised for review by this Court 5

II. Adjudication of contempt of Court in this case is not substantial for review by this Court 8

III. The judgment is supported by the evidence 9

TABLE OF CASES

Reported decisions of this case:
372 Pa. 612, 95 A. 2nd 282
170 Pa. Superior Ct. 579, 88A. 2nd 104

Beauharnis v. Illinois, 343 U. S. 250, 96 Law Ed. 919, 931.

Blodgett v. Superior Court, 121 Cal. 290 Pac. 293, 72 A. L. R. 482.

Bowe v. Scott, 233 U. S. 658, 663, 58 Law Ed. 1141, 1144, 34 S. Ct. 769.

Bushnell v. Crooke Min. & Smelt. Co., 148 U. S. 682, 37 Law Ed. 610.

Butler v. Gage, 138 U. S. 52, 34 Law Ed. 869.

Charleston Federal Sav. & Loan Assn. v. Alderson, 324 U. S. 192, 89 Law Ed. 856, 860.

Cooks v. United States, 267 U. S. 517, 69 Law Ed. 767.

Ex parte v. Earman, Fla., 95 So. 735, 31 A. L. R. 1226.

Ex parte Terry, 128 U. S. 225, 32 Law Ed. 405.

Godchaux Co. v. Estopinal, 251 U. S. 179, 181, 64 Law Ed. 213, 214, 40 S. Ct. 116.

Herndon v. Georgia, 295 U. S. 441, 443, 79 Law Ed. 1530, 1532, 55 Supreme Ct. 794.

Loeber v. Schroeder, Admr., 149 U. S. 580, 37 Law Ed. 856, 859.

In Re McCarty, 29 Nev. 110, 85 Pac. 352.

MacInnis v. United States, 191 Fed. 2nd 157.

Rooker v. Fidelity Trust Co., 261 U. S. 114, 117, 67 Law Ed. 556, 563, 43 S. Ct. 288.

Sacher v. United States, 343 U. S. 1, 96 Law Ed. 717.

Sawyard v. Denny, et al., 158 U. S. 180, 39 Law Ed. 941, 942.

Texas v. P. R. Co., & So. Pac. R. Co., 137 U. S. 48, 54, 34 Law Ed. 614, 616.

United States v. Greed, 176 Fed. 2d 169.

United States v. Hall, 176 Fed. 2d 163.

Wilson, et al. v. Cooke Commissioner, 337 U. S. 474, 90 Law Ed. 793, 801.

Winona & St. P. R. Co. v. Plainview, 143 U. S. 462, 35 Law Ed. 225.

Zucht v. King, et al., 260 U. S. 174, 67 Law Ed. 194, 198.

Supreme Court Rules, No. 12 (1).

28 U. S. C. A. 1257 (3)

QUESTIONS PRESENTED

1. Where in a contempt of court proceeding no alleged federal question is raised until after adjudication by a state supreme court and then is raised for the first time by petition for reargument which is refused, shall the Supreme Court review the case?

2. Whether under the facts of this case the adjudication of contempt of court is substantial for review by this Court.

3. Whether the judgment of the trial judge, affirmed by the supreme court of the state, is supported by the evidence.

STATEMENT OF THE CASE

This case was a proceeding brought against Sherman K. Levine, District Attorney of Lawrence County, Pennsylvania, for contempt of court in respect to its President Judge, W. Walter Braham.

Lawrence County has two adjoining courtrooms, a President Judge (W. Walter Braham), an Additional Law Judge (John G. Lamoree), a District Attorney (Sherman K. Levine) and an Assistant District Attorney.

On November 19, 1951, the President Judge upon written petition of the District Attorney fixed two cases of the Department of Public Assistance for trial on November 30, 1951. Subsequently the District Attorney fixed a sentence court for the same day. When the time for trial arrived, the District Attorney elected to go into Court Room No. 2 and help his assistant dispose of sentences, although the Judge there presiding never ordered or requested him to do so. The President Judge sent a messenger three times to request the District Attorney to come or send some one to represent the Commonwealth in his court room. The District Attorney refused. The President Judge was obliged to try the cases alone.

Late in the morning the Assistant District Attorney came into Court Room No. 1 and later the

District Attorney. When the latter was asked why he had not furnished assistance, he retorted rudely and insolently in open court:

> "That is the way with this court, always mixing things up, everything is fixed on the same day."

The President Judge said:

> "The people of the county pay for two district attorneys and are entitled to have both court rooms covered."

The District Attorney replied:

> "The people of the county are getting their money's worth."

The District Attorney made no further explanation and no apology. On December 3, 1951, the President Judge called the District Attorney to his chambers and made a statement which was taken down by the court stenographer, transcribed, and a copy given the District Attorney. In this statement the President Judge, after expressing regret concerning the occasion, gave the District Attorney the option of accepting a reprimand for his conduct or of standing trial for contempt. The District Attorney replied by a letter demanding trial by the Additional Law Judge and accusing the President Judge of instituting the proceedings to cover up some dereliction of his own which the District Attorney said was then under investigation by his office.

Formal charges of contempt were made and tried by the President Judge. At trial he placed on the record some of the circumstances and stated

the precise language used by the District Attorney. The defense of the District Attorney was heard in full and argument had. The District Attorney was found guilty and directed to pay the sum of one hundred ($100.00) dollars for the use of the county and costs. The judgment was affirmed by the Superior Court and by the Supreme Court of Pennsylvania.

There was no suggestion that a federal question was involved until after affirmance by the Supreme Court of Pennsylvania. A motion for reargument was then made by the District Attorney and was refused without opinion.

The opinion of the Pennsylvania Superior Court is reported in 170 Pa. Superior Ct. 579, 88 A. 2d 104, and the subsequent opinion of the Pennsylvania Supreme Court is reported in 372 Pa. 612, 95 A. 2nd 282. Thereafter a petition for reargument was filed, but refused without opinion: 372 Pa. 612, 614.

ARGUMENT

The respondent submits that the petition for writ of certiorari should be refused for the following reasons:

1. No alleged federal question was ever raised in this case until after adjudication by the state supreme court.

2. Under the facts of this case the adjudication of contempt of court is not substantial for review by this Court.

3. The judgment of the trial judge, affirmed by the supreme court of the state, is supported by the evidence.

I. NO FEDERAL QUESTION PROPERLY RAISED FOR REVIEW BY THIS COURT.

No federal question was raised in the trial court. Likewise no federal question was raised in the respective appeals to the Superior Court and the Supreme Court of Pennsylvania. No federal question was argued orally or in the briefs. The present petitioner attempted to raise for the first time a federal question in a petition for rehearing, after judgment. The petition was refused.

This is conceded by the petitioner. For he states, at page 2, as the alleged basis of jurisdiction for review by this Court:

> "The decision sought to be reviewed is the refusal of the Supreme Court of Pennsylvania to grant a petition for reargument, filed February 24, 1953, and denied, per curiam, March 24, 1953, in which petition, Petitioner specially set up and claimed under said Fourteenth Amendment of the Constitution of the United States his right not to be deprived by the Commonwealth of Pennsylvania and the majority opinion of the Supreme Court of Pennsylvania of his liberty and property without due process of law."

The attempt to inject a federal question at this stage is too late and the petition for writ of certiorari should therefore be dismissed.

Certiorari to review a decision of the Court of last resort of a state will not be allowed under Section 3 of the statute 28 U. S. C. A. 1257 (3) unless the federal question has been raised and ruled in the trial court and in the appellate court below. This is the plain requirement of Rule 12 (1) of the Supreme Court. As stated by Mr. Justice Frankfurter in Beauharnis v. Illinois, 343 U. S. 250, 96 Law Ed. 919, 931:

> "The benefits of hypothetical defenses, never raised below or pressed upon us are not to be invoked in the abstract."

This is true of an attack on a state statute: Charleston Federal Savings & Loan Association v. Alderson, 324 U. S. 192, 89 Law Ed. 856, 860; Wilson et al v. Cook Commissioner, 337 U. S. 474, 90 Law

Ed. 793, 801. The same rule applies to alleged errors in the application of principles of general law; the question must have been raised and decided in the court below: Sawyard v. Denny et al, 158 U. S. 180, 39 Law Ed. 941, 942.

As to raising the federal question for the first time in a petition for rehearing the rule is well stated in Loeber v. Schroeder, Admr., 149 U. S. 580, 37 Law Ed. 856, 859, as follows:

> "It is also well settled by the decisions of this court that the attempt to raise for the first time a Federal question in a petition for rehearing, after judgment, comes too late. Texas v. P. R. Co. v. Southern Pac. R. Co., 137 U. S. 48, 54, 34 Law Ed. 614, 616; Butler v. Gage, 138 U. S. 52, 34 Law. Ed. 869; Winona & St. P. R. Co. v. Plainview, 143 U. S. 462, 35 Law Ed. 225; and Bushnell v. Crooke Min. & Smelt. Co. ante, p. 610." (Last citation is 148 U. S. 682, 37 Law Ed. 610.)

A federal question first presented in a petition for rehearing to the highest court of the state after a final decision of that court, and there denied without opinion, is raised too late for judicial review by the Supreme Court of the United States. In addition to above cases see:

Herndon v. Georgia, 295 U. S. 441, 443, 79 Law Ed. 1530, 1532, 55 S. Ct. 794;

Godchaux Co. v. Estopinal, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116;

Rooker v. Fidelity Trust Co., 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288;

Bowe v. Scott, 233 U. S. 658, 663, 58 L. Ed. 1141, 1144, 34 S. Ct. 769.

In the Bowe case above the Supreme Court mentions this proposition as "elementary".

The petition should therefore be dismissed for want of jurisdiction.

II. ADJUDICATION OF CONTEMPT OF COURT IN THIS CASE IS NOT SUBSTANTIAL FOR REVIEW BY THIS COURT.

The alleged Federal question stated in the petition before the Court is not substantial. It is not substantial because the Supreme Court has previously decided all the essential principles involved: Zucht v. King et al, 260 U. S. 174, 67 Law Ed. 194, 198.

The point most complained of is the employment by the Judge of his own knowledge as to what happened in his own court room before his face. Yet this has long been part of the law of contempt. The withdrawal of the defendant from the court room where he had been guilty of contempt of court and the making of an order without hearing and in his absence were sustained in Ex parte Terry, 128 U. S. 225, 32 Law Ed. 405. In Sacher v. United States, 343 U. S. 1, 96 Law Ed. 717, the trial judge employed his personal knowledge of contumelious conduct, occurring in his presence during nine months of trial, to sentence for contempt the attorneys who had tried the case. In MacInnis v. United States, 191 Federal 2nd 157,

United States v. Greed, 176 Federal 2nd 169, and United States v. Hall, 176 Federal 2nd 163, it was held that sentence for contempt committed in the presence of the Court need not be immediate. It was sustained in these cases, although imposed several days later and without trial. In each of these cases certiorari was refused by the Supreme Court.

In the case at bar the trial judge stated at the outset that no evidence was needed as to matters occurring in the presence of the Court. He employed his own knowledge supplemented by testimony as to matters outside his own personal knowledge.

The inherent power of a trial judge to adjudicate a person guilty of contempt of court in open court cannot be challenged. Nor is this power lost by judicious reflection and consideration.

The merits of this case were carefully reviewed by the highest court of Pennsylvania and the judgment was affirmed.

It is submitted that there is nothing substantial for review by this Court and the petition for writ of certiorari should accordingly be dismissed.

III. THE JUDGMENT IS SUPPORTED BY THE EVIDENCE.

The fact which the District Attorney seeks most earnestly to suppress is that on November 19th the Department of Public Assistance cases were fixed

for trial on November 30 upon his own motion. (91a).

Hence the constantly repeated idea that the trial judge required the District Attorney to abandon his work in Court Room No. 2 is false. Rather, the process of the court had gone out in the Department of Public Assistance cases, the parties were in court, and the District Attorney was merely asked to perform his part in the legal procedure which he had instituted. The District Attorney attempted to contend that the President Judge had indicated his intention to be out of town on November 27 through 30 inclusive. This was erroneous; he admits being twice in court before the President Judge on November 28. (120a)

When he did elect to come into court, the District Attorney had no word of regret or apology. He denounced the court for fixing business contrary to his wishes. The idea that two district attorneys were necessary in Court Room No. 2 is unfounded. On the occasion in question pleas were received and sentences fixed in twenty-three cases, all misdemeanors. Nineteen defendants were involved. Included were a large number of cases of drunken driving and vagrancy in which a standard sentence was imposed. There had never been a custom of shutting down one court room so another might finish early. Both courts were substantially through at noon. There were no cases for trial at the ensuing term. There was no reason for humiliating and belaboring the court in the name of speed. A court is a deliberative body. In no sense was the court calendar overloaded.

All of the District Attorney's witnesses said they failed to hear the initial question of the Judge and the District Attorney's insolent and defiant answer. Mr. Vance heard it in part. The Court heard and understood that its authority was being boldly challenged. It did not matter whether the District Attorney had caused business to be fixed at a certain time; he would come when he felt like it. The absence of any expression of regret at any time and the letter which the District Attorney wrote on December 4, 1951, (129a-130a) are decisive. This was not just incivility, it was contempt of court.

The key to this case is found in the letter just mentioned. The President Judge having had no word of inquiry, regret or apology, summoned the District Attorney to his office and told him that his conduct had amounted to contempt. He proposed to cite the District Attorney for contempt, but allowed the alternative of "some words of public instruction, warning and reproof" as an alternative (103a-105a).

Most significant was the District Attorney's reaction. He at once adopted the attitude which is all too common among attorneys for defendants in criminal court—try the prosecutor. Accordingly he set out to try the court. He began with a charge that the Judge falsely and maliciously trumped up the charges in question to cover some dereliction of his own. There was the implied threat that the Judge would proceed at his peril. This language contained in the District Attorney's letter of December 4, 1951, (129a-130a) as follows:

> "Your statements regarding the friendly relations between us are insincere and do not impress me. I believe the fact that your conduct in certain matters is now under investigation by my office had no little to do in motivating your present action."

With the sending of this letter the Court had no alternative but to proceed. The letter itself was an act of contempt: Cooks v. United States, 267 U. S. 517, 69 Law Ed. 767; Blodgett v. Superior Court, 121 Cal., 290 Pac. 293, 72 A. L. R. 482; in re McCarty, 29 Nev. 110, 85 Pac. 352; Ex parte Earman, Fla. 95 So. 735, 31 A. L. R. 1226. The charges so recklessly made in the letter were utterly unfounded, relating to the Judge's part in attempting to preserve for posterity a beautiful valley.

The attitude of bitter denunciation of the trial judge has continued throughout the case. In the statement of questions involved there is persistent assumption that it was the Court which instituted an attack on the District Attorney. The talk is all about the office of District Attorney and the Judge who made an attack on it. Nothing about the District Attorney who refused to honor the case which he himself had caused to be assigned and who denounced, ridiculed and ultimately threatened the Judge who tried to hold him to his duty.

The whole argument of the petitioner pivots on the contention that the evidence does not support a finding of the contempt language. It is suggested by that argument that the trial judge should be vacuous to what transpired before his own eyes and within his hearing. Inherent in court

contempt cases is the personal knowledge of the trial judge as to what transpired. At the outset the trial judge stated on the record the remarks complained of. Several witnesses called by the District Attorney admitted no knowledge of the beginning of the colloquy. The personal knowledge of the Judge was not extinguished.

If ever there was a case where the power was cautiously observed, it is this case. For the trial judge, instead of hasty and immediate action, deferred for more considered judgment. The conduct of the District Attorney was reviewed by the appellate judges of Pennsylvania and the judgment of contempt was affirmed.

The judgment is supported by the record and there was no lack of due process.

CONCLUSION

The petition for writ of certiorari should be dismissed,,

Respectfully submitted,

ALVAH M. SHUMAKER,
WILLIAM D. COBAU
J. GLENN BERRY,
COBAU & BERRY,
New Castle, Pa.

Attorneys for Respondent.